LOBBY ACT WAIVER FOR BARSHEFSKY/Trade Agreements & Statutes

SUBJECT: **A resolution to waive certain Lobby Reform Act provisions of the Trade Act as they may apply to the Barshefsky nomination . . . S.J. Res. 5. McCain motion to table the Hollings amendment No. 19.**

ACTION: MOTION TO TABLE AGREED TO, 84-16

SYNOPSIS: S.J. Res. 5, a resolution to waive certain Lobby Reform Act provisions of the Trade Act as they may apply to the Barshefsky nomination, will waive for Charlene Barshefsky the provision that forbids the appointment of a United States Trade Representative or Deputy United States Trade Representative who has directly represented, aided, or advised a foreign government or foreign political party in a trade dispute or negotiation with the United States.

The Hollings amendment would add the following statement to the resolution, "No international trade agreement which would in effect amend or repeal statutory law of the United States law may be implemented by or in the United States until the agreement is approved by the Congress."

Debate was limited by unanimous consent. Following debate, Senator McCain moved to table the Hollings amendment. Generally, those favoring the motion to table opposed the amendment; those opposing the motion to table favored the amendment.

Those favoring the motion to table contended:

Argument 1:

Proponents of the Hollings amendment say that it would simply prohibit the executive branch from implementing trade agreements that violated Federal statutes. The President is already prohibited from implementing trade agreements that violate Federal laws. Trade agreements are not like treaties, which are the equivalent of laws, and can thus be used to overturn existing laws; they are like regulations, which must conform to laws. If the Hollings amendment were simply a restatement of this fact it would be superfluous but not objectionable. However, the Hollings amendment would do much more than restate a basic fact of our constitutional form

(See other side)

YEAS (84)

Republican (48 or 87%)

Abraham
Allard
Bennett
Bond
Brownback
Burns
Campbell
Chafee
Coats
Cochran
Collins
Coverdell
D'Amato
DeWine
Domenici
Enzi
Frist
Gorton
Gramm
Grams
Grassley
Gregg
Hagel
Hatch
Hutchinson
Hutchison
Inhofe
Jeffords
Kyl
Lott
Lugar
Mack
McCain
McConnell
Murkowski
Nickles
Roberts
Roth
Santorum
Sessions
Shelby
Smith, Gordon
Specter
Stevens
Thomas
Thompson
Thurmond
Warner

Democrats (36 or 80%)

Akaka
Baucus
Bingaman
Boxer
Breaux
Bryan
Bumpers
Cleland
Daschle
Dodd
Durbin
Feinstein
Glenn
Graham
Harkin
Johnson
Kennedy
Kerrey
Kerry
Kohl
Landrieu
Lautenberg
Leahy
Levin
Lieberman
Mikulski
Moseley-Braun
Moynihan
Murray
Reed
Reid
Robb
Rockefeller
Sarbanes
Torricelli
Wyden

NAYS (16)

Republicans (7 or 13%)

Ashcroft
Craig
Faircloth
Helms
Kempthorne
Smith, Bob
Snowe

Democrats (9 or 20%)

Biden
Byrd
Conrad
Dorgan
Feingold
Ford
Hollings
Inouye
Wellstone

NOT VOTING (0)

Republicans (0)

Democrats (0)

EXPLANATION OF ABSENCE:
1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

of government. The amendment contains the vague words, "in effect." If this amendment were adopted, it could be successfully argued in court that all laws are enacted with some latitude, and that regulations and executive agreements to implement those laws within that latitude have the effect of defining the meaning of those laws, so therefore any executive agreement has the effect of redefining, and in effect amending, the laws within which it is operating. The Hollings amendment would make it impossible for the President to negotiate trade agreements, no matter how minor, that were not then subject to congressional approval.

This amendment has been offered largely because of its sponsor's objection to a trade agreement on telecommunications that has just been negotiated by the United States Trade Representative (USTR). He believes the agreement violates current law (sections 310(a) and 310(b) of the Communications Act of 1934) on foreign ownership of telecommunications licenses in the United States. He is simply wrong. Those sections prevent direct foreign ownership, but they specifically allow indirect foreign control. (Ownership and control of a corporation are not necessarily the same; the stock owners of a company do not always determine company policies). A corporation that controls a domestic corporation that has a communications license may be 100-percent foreign owned. The degree of foreign ownership for such a corporation can be limited by the Federal Communications Commission (FCC) by as much as 75 percent if in the public interest. The trade agreement does not alter in any way the statutes on ownership or indirect control. All it alters is the test devised by the FCC to make a public interest determination (the Effective Competitive Opportunities test). As part of that test, the FCC considers whether the foreign country in question allows similar access (reciprocity) to its telecommunications market. Under the trade agreement, the FCC will no longer use the reciprocity test due to the substantial market access commitments that are given by the United States' major trading partners in the agreement. The agreement covers over 90 percent of world telecommunications revenue and includes 69 countries. It ensures that United States companies will be allowed to compete against and to invest in existing carriers, and it will open up nearly 100 percent of the top 20 foreign markets (right now, American companies have access to only 17 percent of the top 20 markets). For consumers, the benefits will be immense as well. For instance, the average cost of international phone calls will drop by 80 percent.

This trade agreement has enthusiastic support from domestic telecommunications companies and consumer groups. The only opposition to it that we know of is from Senators who generally oppose trade agreements. The argument that they have raised against it, that it violates current law, is false. Therefore, we urge the rejection of the Hollings amendment.

Argument 2:

This amendment is unconstitutional because it affects revenues, and revenue measures must originate in the House. The House will reject this resolution if we pass the Hollings amendment. Therefore, we support the motion to table.

Those opposing the motion to table contended:

We should not have had to offer the Hollings amendment. It states, in very simple, straightforward language, a basic constitutional principle--Congress makes the laws. The President cannot negotiate and then implement trade agreements that violate duly enacted laws. He may negotiate an agreement that is in violation of a law, but before he implements it he must come to Congress and ask for it to pass a new law to make it legal. He cannot implement an illegal agreement. The reason we have to offer this amendment is that the acting USTR, Charlene Barshefsky, has just concluded a trade agreement that directly violates United States law on a very controversial subject, foreign ownership of United States broadcasters. When the Senate considered the Telecommunications Reform Bill last Congress no agreement could be reached on this issue. Senators strongly favored keeping the reciprocity test--they thought that the United States should only open its markets to countries that opened their markets by an equal amount. The House and the White House wanted the United States to give up more than it got in return. During those negotiations, then-USTR Kantor explicitly admitted that the changes being sought by the White House required legislative changes. Now, though, we have acting-USTR Barshefsky saying that no legislative changes are required to give foreign companies 100-percent access to our markets without getting the same in return. In fact, in many cases we get only a small percentage in return.

We are always amazed at how our colleagues' and the Administrations' blind faith in "free trade" makes them unable to see how destructive that trade theory is. In this case, Ambassador Barshefsky has opened the United States' telecommunications market completely to foreign competitors. They may have 100-percent control over any telecommunications company in the United States; foreign companies may soon take over one of the major networks; Castro may soon start deciding programming for stations in Florida. In return the United States gets next to nothing. For instance, Australia, Italy, Japan, France, New Zealand, and Spain all say that they will open their markets, but then they turn around and place severe ownership restrictions on U.S. companies. Investment in most of the big companies is strictly limited or even prohibited. Japan will not allow any investment in Nippon Telephone and Telegraph; Korea will allow only 3 percent ownership of Korea Telegraph.

Senators should oppose the telecommunications agreement because it has opened up the U.S. market while getting little in return. Even if they favor the agreement, though, they should support the Hollings amendment because it protects congressional authority from presidential encroachment. We urge our colleagues to oppose the motion to table.